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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD ARNOLD PARKER II,

Defendant and Appellant.

G055336

(Super. Ct. No. 16HF0343)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Judgment affirmed in part, and remanded with directions.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Robin Urbanski, Meredith White and Sharon L. Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

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Generally, prosecutors cannot introduce character evidence as part of the proof that a defendant committed a crime. However, if a defendant introduces evidence of an alleged *victim's* character for violence, the prosecution can then introduce evidence of the defendant's character for violence. (Evid. Code, § 1103, subd. (b).)¹

Here, defendant Richard Arnold Parker II hit his girlfriend Miesha D. over the head with a drinking glass, causing an injury; thereafter, Miesha stabbed Parker in the chest with a knife. At trial, Parker introduced evidence regarding Miesha's character for violence. The prosecution introduced evidence regarding Parker's character for violence. A jury found Parker guilty of an aggravated battery and related crimes.

On appeal, Parker argues that the trial court erred by admitting the prosecution's character evidence against him. Parker primarily contends that one of the prosecution's witnesses testified out of order. But Parker did not raise this objection during the trial, and we otherwise find no abuse of discretion.

Parker also argues that the matter should be remanded for resentencing. We agree. On remand the trial court is directed to exercise its—now existing—discretion to possibly strike the five-year punishment for a prior serious felony conviction. The court is also directed to clarify a separate sentencing ruling and to amend the abstract of judgment. In all other respects, the judgment is affirmed.

I

FACTS AND PROCEDURAL BACKGROUND

On March 6, 2016, Miesha and Parker were living together in a Laguna Hills apartment. During the morning, they got into an argument after Miesha refused to have sex with Parker; thereafter, they slapped and punched each other during the day. Later in the evening, Parker hit Miesha in the head with a drinking glass, which broke,

¹ All further undesignated statutory references will be to the Evidence Code.

causing a large cut above Miesha's right ear. Miesha subsequently stabbed Parker with a knife, leaving a wound on his chest. Police responded to a disturbance call. While police were questioning Miesha, Parker called out, "remember, nothing happened." Thereafter, Miesha gave conflicting statements regarding the incident, including a claim that she hit herself in the head with the glass.²

Charges and Pretrial Evidentiary Ruling

The prosecution filed a four-count information charging Parker with attempted murder, assault with a deadly weapon, domestic battery with corporal injury, and attempting to dissuade a witness from reporting a crime. The information alleged two great bodily injury enhancements, a prior "strike" conviction, and a prior serious felony conviction.

During motions in limine, Parker sought to introduce evidence of Miesha's violent conduct towards two of her former roommates. The prosecutor argued that if Parker introduced character evidence concerning Miesha, then he would seek to introduce character evidence concerning Parker; specifically, a former girlfriend who would testify to a 2001 corporal injury, and another witness who would testify to a 2003 sexual battery during a residential burglary. Parker argued that the 2001 incident was too remote in time and that the 2003 incident was too dissimilar from the charged crimes. The trial court ruled that if Parker introduced the proffered evidence concerning Miesha's violent character, then it would allow the prosecution to introduce the proffered evidence concerning Parker's violent character.

² Parker is not challenging the sufficiency of the evidence; therefore, we need only briefly summarize the facts, construing them "in the light most favorable to the judgment." (*People v. Curl* (2009) 46 Cal.4th 339, 342, fn. 3.)

Prosecution's Case-in-Chief

Miesha generally testified that she could not remember how she received injuries on the night of the incident. The trial court allowed the prosecution to read into evidence Miesha's preliminary hearing testimony.

Parker's counsel cross-examined Miesha about a violent incident involving Mark L., a former roommate. Miesha denied that she had ever threatened to stab Mark or that she had destroyed his property. Parker's counsel also cross-examined Miesha about a violent incident involving Zina K., another roommate. Miesha denied punching Zina in the face. The trial court said that "the door appears to be opened" as to the prosecution's proffered character evidence.

During a break in the testimony of a law enforcement officer, the court said to the prosecutor: "With that, then, . . . do you have a witness that we're going to be taking out of order at this time; is that correct, sir?" The prosecutor responded, "I do your honor. [¶] With the court's permission, I would like to call Natalie M[.] to the stand." Parker did not object to Natalie testifying out of order.

Natalie testified that in August 2003, a man entered her apartment late at night and got into her bed. The man touched her breasts, stomach, and legs. Natalie asked the man to leave, and he eventually left. Natalie had seen the man before in her neighborhood, but she did not know him. The parties stipulated that man who entered Natalie's apartment was Parker.

Defense Case

Justin L. testified that he lived in Laguna Hills in the apartment directly below Parker's apartment. On the night of the incident he heard screaming, arguing, and a male voice that said, "'Don't cut me. Don't cut me.'" Justin heard a man scream, followed by "some shuffling around, and banging, and a female voice screaming back several expletives."

Mark L. testified that Miesha had rented a room from him in July 2016, after responding to his ad on Craigslist. Mark did not charge Miesha rent because he thought there was a possibility of a romantic relationship, but Miesha began drinking heavily. Miesha made numerous threats, including threatening to stab Mark in his sleep. At some point, there was an altercation where Miesha “physically prevented me from getting into the garage.” Miesha eventually left, stealing some of Mark’s property.

A sheriff’s deputy testified about an incident involving Zina K. and Miesha in April 2017. The deputy testified that he responded to a disturbance call at a home in San Bernardino. The deputy contacted Zina, who had dried blood on her lips. Zina told the deputy that Miesha had hit her.³ The deputy spoke to Miesha, who was “very intoxicated.” Miesha initially denied hitting Zina, then she said that Zina was upset because Miesha would not sleep with her.

Parker admitted to inflicting a corporal injury on a cohabitant in 2001. Parker also admitted to a residential burglary with the intent to commit sexual battery in 2003 (Natalie). Parker said that on the night of the incident with Miesha, she was to move out the following day. Parker testified that he fell asleep and was awakened by Miesha, who was holding a knife. Miesha said that she was not leaving and “that if anyone was leaving, it would be me.” Parker said that Miesha stabbed him in the chest. Parker said that he hit Miesha in the head with a drinking glass and the glass broke. According to Parker, “I just wanted her to drop the knife. I didn’t want to get stabbed anymore.”

Prosecution’s Rebuttal Case

Trisha M. testified that she had a 13-year-old daughter with Parker. In July 2001, they were living together and had an argument that got out of control. Parker

³ The prosecution initially objected on hearsay grounds, but then withdrew the objection.

punched Trisha in the face while she was holding their daughter. Trisha went down to the ground and Parker kicked her a few times. Trisha had a swollen face and suffered injuries to her head.

Further Proceedings

The jury found Parker guilty of assault with a deadly weapon, domestic violence causing corporal injury, and attempting to dissuade a witness. The jury found true two great bodily injury allegations. The jury was deadlocked on the attempted murder count; the trial court granted the prosecution's motion to dismiss the charge. The court found true a prior "strike" conviction. The court also found true a prior serious felony conviction. The court imposed an 11-year prison sentence.

II

DISCUSSION

Parker contends: A) the trial court erred when it admitted the character evidence against him; B) due to a recent statutory change, the court can now exercise its discretion and dismiss the prior serious felony conviction enhancement; and C) the record is not clear as to the court's rulings regarding the great bodily injury enhancements. We shall address each contention in turn.

A. Character Evidence

Ordinarily, "evidence of a person's character . . . (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove . . . conduct on a specified occasion." (§ 1101, subd. (a).) However, such evidence is admissible in a criminal case when it is: "Offered by the defendant to prove conduct of *the victim* in conformity with the character or trait of character." (§ 1103, subd. (a)(1), *italics added*.) "[E]vidence of the defendant's character

for violence . . . is not . . . inadmissible . . . if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character . . . and is offered *after evidence that the victim had a character for violence.*” (§ 1103, subd. (b), italics added.)

Generally, “all relevant evidence is admissible.” (§ 351.) Nonetheless, a trial court “may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (§ 352.) Evidentiary rulings are reviewed for an abuse of discretion. (*People v. Thompson* (2010) 49 Cal.4th 79, 128.) A court’s evidentiary rulings “‘will not be disturbed except on a showing [that] the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation].’” (*People v. Peoples* (2016) 62 Cal.4th 718, 745.)

An evidentiary issue is forfeited when a defendant did not object to the admission of the evidence at trial on the same grounds being raised in the appeal. (See *People v. Navarette* (2003) 30 Cal.4th 458, 507 [“Defendant did not raise this specific objection in the trial court, and therefore he forfeited the issue”].) Strong policy reasons support this basic forfeiture rule: “It is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided. [Citations.]” (*People v. Vera* (1997) 15 Cal.4th 269, 276, overruled on other grounds in *People v. French* (2008) 43 Cal.4th 36, 46-47.)

Here, during the prosecution’s case-in-chief, Natalie testified Parker had sexually assaulted her. The prosecution presented this evidence for the purpose of showing that Parker had a character for violence, and his alleged violence against Miesha was in conformity with his character. (See § 1103, subd. (b).) On appeal, Parker’s primary contention is that the trial court erred in admitting Natalie’s testimony because she testified before Parker presented evidence concerning Miesha’s character for violence. That is, Natalie testified during the prosecution’s case-in-chief, rather than

during the prosecution’s rebuttal case. But Parker did not make this objection at trial; therefore, the issue has been forfeited for purposes of this appeal.

Recognizing this forfeiture issue, Parker argues in the alternative that his trial counsel provided ineffective assistance by failing to make an objection. (See *Strickland v. Washington* (1984) 466 U.S. 668, 693.) In an appeal, a conviction will be reversed for ineffective assistance only if: 1) the record affirmatively discloses trial counsel “had no rational tactical purpose for the challenged act or omission”; 2) “counsel was asked for a reason and failed to provide one”; or 3) “there simply could be no satisfactory explanation.” (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

Here, it is likely that Parker’s trial counsel did not object to Natalie testifying out of order because she would have simply testified in the prosecution’s rebuttal case and any objection would have been pointless.⁴ Also, the prosecution may have offered a “good reason” for taking Natalie’s testimony out of order had Parker objected (the rationale for the forfeiture rule). (See Pen. Code, § 1093, subd. (d) [“for good reason” a trial court may permit parties to offer “rebutting testimony” in “their original case”].) In short, Parker has failed to establish ineffective assistance of counsel.

Finally, Parker argues the trial “court abused its discretion by allowing evidence of both the prior burglary and the prior domestic violence at all.” Parker contends that the probative value of the 2003 burglary involving Natalie was outweighed by its prejudicial impact. (§ 352.) Parker contends the same as to the 2001 domestic violence incident involving Trisha, and also that it was too “remote” from the instant offense. Those objections were made at trial and were considered by the court in a pretrial hearing with both counsel present.

⁴ We note that attorneys—in the spirit of comity—often allow an opposing witness to testify out of order without objection. Generally, we see nothing “ineffective” in extending this courtesy.

The trial court said, “it sounds like from what I’m hearing from both of you is that obviously we have the self-defense, and obviously we have who was the aggressor.” The court reasoned that as far as the “residential burglary . . . because [Parker] had the intent to do so for a sexual battery that would be considered a crime of violence.” The court reasoned that as far as the 2001 domestic violence incident “while it is remote” it was “prior conduct that would go towards [Parker] being portrayed by the People as someone who is violent.” The court ruled that “if the defense opens the door . . . as far as portraying the victim as having a character for violence” then the prosecution would be allowed to introduce its proffered character evidence against Parker.

We find no abuse of discretion. While other judges may have ruled differently, it is apparent that the trial court made a reasoned judgment that was neither arbitrary nor capricious. (See *People v. Peoples*, *supra*, 62 Cal.4th at p. 745.) Thus, we find no error in the court’s exercise of discretion under section 352.

B. Retroactive Application of Legislative Change

The trial court imposed a five-year sentencing enhancement because Parker had a prior serious felony conviction. (Pen. Code, § 667, subd. (a)(1).) “In compliance with subdivision (b) of Section 1385, any person convicted of a serious felony who previously has been convicted of a serious felony . . . shall receive . . . a five-year enhancement for each such prior conviction The terms of the present offense and each enhancement shall run consecutively.” (Pen. Code, § 667, subd. (a)(1).)

Prior to January 1, 2019, a trial court’s discretion was severely restricted: “This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.” (Pen. Code, § 1385, subd. (b).) However, the Legislature recently amended the statute. (Stats. 2018, ch. 1013, § 2.) The law now provides: “If the court has the authority . . . to strike or dismiss

an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice” (Pen. Code, § 1385, subd. (b)(1).)

Parker argues that the amended version of section 1385, subdivision (b) applies retroactively because his case is not yet final on appeal. (See *In re Estrada* (1965) 63 Cal.2d 740.) The Attorney General concedes the issue and we agree; therefore, we remand the matter to the trial court for its consideration. Of course, we take no position on the merits.

C. Great Bodily Injury Enhancements

At sentencing, the trial court exercised its discretion to strike the two alleged great bodily injury enhancements. (Pen. Code, § 12022.7, subd. (e).) Parker contends that it is not clear whether the court intended to strike the enhancements, which affects his conduct credits, or whether the court intended to strike only the punishment for the enhancements. (See *In re Pacheco* (2007) 155 Cal.App.4th 1439.)

We agree with the Attorney General that the trial court apparently intended to strike only the punishment for the enhancements. But because we are remanding the matter for another reason, and out of an abundance of caution, we direct the court to clarify the record. We also direct the court to amend the abstract of judgment to show the fees and assessments for each conviction, rather than one total amount, as pointed out by the Attorney General. (Pen. Code, § 1465.8; Gov. Code, § 70373.)

III

DISPOSITION

The matter is remanded to the trial court to consider whether to exercise its discretion to strike the five-year punishment for Parker's prior serious felony conviction. (Pen. Code, §§ 667, 1385, subd. (b)(1).) The court is directed to clarify the record as discussed within this opinion. The court is further directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

In all other respects, the judgment is affirmed.

MOORE, ACTING P. J.

WE CONCUR:

ARONSON, J.

GOETHALS, J.